

# Decisions of Interest

FEBRUARY 21, 2023

## CRIMINAL

### FIRST DEPARTMENT

#### ***People v Bailey*** | Feb. 14, 2023

MURDER | CPW | CONCURRENT TERMS

The defendant appealed from a New York County Court judgment convicting him of 2<sup>nd</sup> degree murder and 2<sup>nd</sup> degree CPW (two counts) after a jury trial and sentencing him to 25 years to life to run consecutively with two concurrent 15-year terms. The First Department modified, running all sentences concurrently. The sentences for murder and CPW (intent to use unlawfully) had to run concurrently. Further, the People did not show that consecutive sentences were permissible for murder and CPW (simple possession). Without evidence of possession of the firearm other than at the moment of the shooting, it was not clear that the possession and use were separate acts. The Office of the Appellate Defender (C. Taylor Poor, of counsel) represented the defendant.

[People v Bailey \(2023 Slip Op 00822\)](#)

#### ***People v Bundy*** | Feb. 16, 2023

NO LAB ANALYSIS | DRUG DEALER TESTIMONY

The defendant appealed from a New York County Supreme Court judgment convicting him of 2<sup>nd</sup> degree conspiracy and 1<sup>st</sup> and 2<sup>nd</sup> degree CSCS. The First Department affirmed. The verdict was not against the weight of the evidence. The controlled substance was not available for lab analysis. But an experienced drug dealer explained to the jury that he bought cocaine from the defendant and tried to cook it into crack cocaine in the presence of another dealer, who testified that he recognized the substance as cocaine.

[People v Bundy \(2023 NY Slip Op 00932\)](#)

#### ***Matter of NYCLU v NYC Dept. of Corr.*** | Feb. 16, 2023

FOIL | UNSUBSTANTIATED COMPLAINTS

New York County Supreme Court granted the petitioner's FOIL petition to the extent of ordering the respondent to produce documents concerning unsubstantiated complaints or allegations of police officer misconduct and to identify and justify proposed redactions. The First Department affirmed. The FOIL personal privacy exemption—which allowed state agencies to protect sensitive matters of little or no public interest—did not create a categorical blanket exemption covering the subject documents. The respondent failed to establish that identifying details could not be redacted to prevent an unwarranted invasion of privacy. Petitioner's request for counsel fees was properly denied since, given the

novel issue presented, it could not be said that the respondent had no reasonable basis for denying access to the records. Robert Hodgson represented the petitioner-appellant. [NYCLU v NYC Dept. of Corr. \(2023 NY Slip Op 00930\)](#)

## SECOND DEPARTMENT

***People v Chung*** | Feb. 15, 2023

RESTITUTION | INSUFFICIENT EVIDENCE

The defendant appealed from a Nassau County Supreme Court judgment convicting him of two counts of 2<sup>nd</sup> degree burglary and other crimes, upon his plea of guilty, and imposing a sentence that included \$53,541 in restitution. The Second Department vacated the restitution provision and remitted for a hearing. Clarifying its precedent, the appellate court explained that the trial court must hold a hearing if the defendant requests one or the record does not contain sufficient facts to support a finding regarding the amount of restitution. John Healy represented the appellant.

[People v Chung \(2023 NY Slip Op 00880\)](#)

***People v Lindsay*** | Feb. 15, 2023

INCOMPLETE PSI | AFFIRMED

The defendant appealed from a Queens County Supreme Court judgment convicting him of 2<sup>nd</sup> degree murder and other crimes after a jury trial. The Second Department affirmed. Supreme Court's reliance on a PSI that did not include an interview with the defendant was not error since he was given a chance to speak at sentencing.

[People v Lindsay \(2023 NY Slip Op 00883\)](#)

## TRIAL COURTS

***People v Lawrence*** | 2023 NY Slip Op 30432(U)

440.10 MOTION | BRADY VIOLATION

The defendant filed a CPL 440.10 motion to vacate a judgment convicting him of 2<sup>nd</sup> degree murder and other crimes. Nassau County Court granted the motion and ordered a new trial. The People conceded that they committed a *Brady* violation by failing to disclose the lead homicide detective's memo book notes and a homicide file containing voluminous documents. The documents were material. They included information about other suspects, leads, and witnesses. Timely access to the documents could have allowed the defendant to develop additional facts and alternative defense theories. The proof of guilt was not overwhelming, and there was a reasonable probability that the outcome would have been different had the documents been timely disclosed. Emery, Celli et al. (Ilaan Maazzel and Scout Katovich, of counsel) represented the defendant.

[People v Lawrence \(2023 NY Slip Op 30432\[U\]\)](#)

***People v Broccolo*** | 2023 WL 1875284

IMPROPER SERVICE | COC AND SOR

The defendant moved to strike the People's COC and SOR, based on improper and untimely service, and to dismiss the sole charge on 30.30 grounds. Suffolk County First District Court granted the motion. The People improperly served the defendant himself

with the COC and SOR at a time when he was represented by Legal Aid. The discovery statute states that the People “shall serve [the COC] upon the defendant.” Where the defendant is represented, service must be made upon counsel (see Rules of Prof Conduct rule 4.2 [a]; CPLR 2103). Suffolk County Legal Aid Society (Bradley Kaufman, of counsel) represented the defendant.

[People v Broccolo \(2023 NY Slip Op 23040\)](#)

### ***People v N.P.* | 2023 WL 2055890**

DVSJA RESENTENCING | PSYCH EXAM BY PEOPLE

The defendant filed a motion, which included an expert opinion report, seeking resentencing pursuant to the DVSJA. After Erie County Supreme Court determined that the defendant was entitled to a hearing, the People filed an OTSC requesting an order directing the defendant to submit to a psychiatric examination by their expert and to provide access to complete mental health and medical records. Supreme Court held that the defendant was required to submit to such exam. CPL 440.47 (2) (e) did not address the issue. But pursuant to its broad discretion, the resentencing court determined that it would be beneficial to hear from both the defendant and the People on the psychiatric issue. The court denied as overbroad the request for the defendant’s records. There was no indication that the defense expert relied on such records to prepare the report.

[People v N.P. \(2023 NY Slip Op 23048\)](#)

## GEORGIA

### ***State v Glanton* | 2023 WL 1494432**

BOLO | NO REASONABLE SUSPICION

The State of Georgia appealed from a trial court order granting a motion to dismiss drug and driving charges. The Court of Appeals of Georgia affirmed. The officer who stopped the defendant’s vehicle was responding to a BOLO describing an aggressive driver in a small, gray passenger vehicle with what appeared to be an orange out-of-state tag driving up a named road. The BOLO was too generalized to warrant a traffic stop. The description would cover a staggering number of vehicles and drivers and could not create a reasonable suspicion to stop the vehicle. There was no information about the time between the crime and the stop so the size of the area in which the offender might be found could not be determined. Further, the defendant was not engaged in any activity which would have otherwise authorized a traffic stop.

[State v Glanton \(A22A1381\)](#)

## FAMILY

## FIRST DEPARTMENT

### ***Matter of Nathaniel H.* | Feb. 16, 2023**

UCCJEA | EMERGENCY JURISDICTION

In a neglect proceeding, the nonrespondent mother appealed from Bronx County Family Court orders denying her motion to convert temporary jurisdiction to permanent

jurisdiction and dismissing the petition against the father. He neglected the child by committing acts of domestic violence against the mother in Texas. She fled and then moved to New York. Family Court properly exercised temporary emergency jurisdiction in issuing a temporary limited order of protection and releasing the child to the mother with ACS supervision. However, the court improperly relinquished emergency jurisdiction where TX was not the child's home state and there were no orders in place there to safeguard the child. Bruce A. Young represented the mother.

[Matter of Nathaniel H. \(2023 NY Slip Op 00927\)](#)

***Matter of Haoxuan X. (Chen X.)*** | Feb. 14, 2023

UNSIGNED OTSC | NOT APPEALABLE

The respondent appealed from a New York County Family Court order which declined to sign his proposed order to show cause seeking to remove the child from foster care and place him with the maternal grandparents. The First Department dismissed the appeal. Family Court's refusal to sign the OTSC was not appealable (see CPLR 5701 [a] [2]).

[Matter of Haoxuan X. \(Chen X.\) \(2023 NY Slip Op 00835\)](#)

## SECOND DEPARTMENT

***Matter of Dysko v Dysko*** | Feb. 15, 2023

NO BEST INTERESTS INQUIRY | REVERSED

The father appealed from certain custody orders rendered by Kings County Supreme Court (IDV Part). The Second Department affirmed the orders that dismissed the father's custody petition and suspended his parental access based on his failure to enroll in court-ordered alcohol treatment. An order granting the mother custody was reversed and the matter was remitted for a hearing. The lower court failed to inquire into the best interests of the children and relied on "adequate relevant information" instead of admissible evidence. Heath J. Goldstein represented the father.

[Matter of Dysko v Dysko \(2023 NY Slip Op 00863\)](#)

[Matter of Dysko v Dysko \(2023 NY Slip Op 00864\)](#)

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